of the loss—whether as carriers or as warehousemen, for the purpose of being forwarded to St. John, under the terms of the 10th condition. We are of opinion that they held them in the latter character, and that there was not evidence to warrant the jury in finding that they were guilty of negligence, on the first question submitted.

As to the promise of the defendant's freight agent to pay for the goods, we are inclined to think the evidence should not have been received. But, at all events, if the defendants could be bound by his promise, it was only conditional to pay if the goods were not insured by the plaintiff, and there was no evidence whether they were so or not: consequently, the finding on that point was also against evidence.

As, in our opinion, the evidence failed to make out the plaintiff's claim, a nonsuit must be entered according to the agreement at the trial.

Supreme Court of Nebraska.

KEFFELL *v.* BULLOCK.

The action of an infant must be brought by his guardian or next friend, who alone is liable for the costs. The infant is not liable to a judgment therefor.

Nor is he liable to a judgment for costs after arriving at full age, in an action brought without a guardian or next friend, but not terminated during infancy, if, on reaching his majority, at the first opportunity, he disclaim all benefit from the proceeding, and refuse to proceed further with the case.

An offer to confess judgment duly made in the court where the action is brought need not be renewed in the Appellate Court in order to be available to the party making it on final judgment.

By the legislation in Nebraska all the disabilities of infancy as they exist by the common law are fully recognised.

LAKE, J.—The defendant in error commenced an action in the County Court for Dodge county against the plaintiff in error, to recover on an account for goods furnished, and labor performed, a balance claimed to be due of $66.90. Immediately upon being summoned the plaintiff in error offered to confess a judgment for the sum of $40, together with the costs then accrued, as provided in sect. 1004 of the Code of Civil Procedure, by which it is enacted that, "If the defendant at any time before trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with

the costs then accrued. But if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs accrued after the offer, but costs must be adjudged against him. But the offer and failure to accept it cannot be given in evidence to affect the recovery, otherwise than as to costs, as above provided." The recovery being less than this offer, the defendant in error had judgment in his favor for the amount of the verdict and costs before the filing of the offer, but against him for all costs made subsequently to that time.

From this judgment the defendant in error appealed to the District Court, where the verdict in his favor was for a still smaller amount. Whereupon, on the 2d day of April 1878, he filed a motion for judgment on the verdict, and for his costs, notwithstanding the said offer to confess, and at the same time proved to the court the fact, then for the first time brought to its attention, that he was still a minor, and would not attain his majority until the 6th day of September of that year. On the 7th of October, while this motion was still pending, and before any further step had been taken in the case, the defendant in error, by special appearance, disclaimed all right to the verdict, or benefit under it, and insisted on "his minority as a bar to any judgment against him for any costs in this case." Acting upon this disclaimer, and the unquestioned minority of the defendant in error as stated, the court dismissed the case generally, and, against the demand of the plaintiff in error, refused to enter judgment in his favor for his costs. This refusal is the ground of the alleged error, and to correct which the case is brought to this court.

The first question to be disposed of is one of practice, raised by defendant in error in his brief. He contends that in order to make an offer to confess judgment under the statute available to the party making it on appeal, the offer must be renewed in the Appellate Court. We cannot so hold. The offer once properly entered, becomes a part of the record of the case, and if not withdrawn, is just as available on final judgment in the Appellate Court as it could have been in the court where made, had no appeal been taken.

The next, and main question presented by the record is much more difficult, and altogether novel in this court. By our legislation all the disabilities of infants, as they exist at common law, are fully recognised. Indeed we are not aware of any statute in this

state modifying them in any respect whatever. Accordingly, we find that section thirty-six, of the Code of Civil Procedure, provides that: "The action of an infant must be brought by his guardian or next friend." And even when brought by his next friend, if it be discovered that the action is not for the infant's benefit, the court, on its own motion, may dismiss it. Our practice in this respect seems to be based upon the unquestionable presumption of law that, until a person arrives at full age, no matter what his mental attainments and experience in life may be, he has not sufficient capacity to decide for himself whether the action would probably benefit him, or whether under all the circumstances it ought to be brought. Observing still further the common law respecting suits by infants, our code, section thirty-seven, provides that: "The guardian or next friend is liable for the costs of the action brought by him." Thus implying very clearly that even although the infant has had the benefit of the judgment of a person of mature years as to the propriety of bringing the action, yet if it result disastrously to him, he shall not be liable to a judgment for the costs. Indeed, one of the chief objects in requiring a next friend seems to be, as was said in *Heft et al.* v. *McGill et al.*, 3 Penn. St. 256, "to supply the want of capacity in the infant, to afford in his own person a party on the record responsible for costs." And we find that independently of statutory regulation, the rule seems to be that no judgment for costs can be rendered against an infant plaintiff: *Bowche* v. *Ryan*, 3 Blackf. 472: *Sproule* v. *Botts*, 5 J. J. Marsh. 162. But in Massachusetts, under a peculiar statute, it is held that an infant plaintiff, and not his *prochein ami*, is liable to judgment for costs. In one case, WILDE, J., remarked: "The defendants claim costs against the *prochein ami*, on the ground that the plaintiff being an infant is not liable therefor; and this claim seems to be supported by the English practice. But our practice seems to be different, and is conformable to our statutes regulating the recovery of costs." In that state, in order to make the *prochein ami* liable for costs, he must endorse the writ therefor: *Smith* v. *Floyd*, 1 Pick. 275; *Crandall* v. *Claid and Wife*, 11 Metc. 288. We have no statute similar to that of Massachusetts, but, as before shown, our legislation harmonized completely with the practice under the common law, both in England and in this country.

Now it would seem to be a reasonable conclusion from what we have already shown, that had judgment been rendered against the defendant in error while he was still a minor, it would have been erroneous. If an infant plaintiff who has had the advice of a guardian or next friend, as to the propriety of commencing his action, cannot be required to pay costs when defeated, upon what principle can he be adjudged to pay them when he has been so indiscrete as to proceed without such aid, relying alone upon his own immature judgment in the matter? We know of none.

It may seem a hardship on the plaintiff in error, to be put to the expense of defending against what was proven to be an unjust demand without recourse finally against the claimant. But this result he could have successfully guarded against by pleading the infancy of the plaintiff in the action in abatement at the outset, by which he would either have brought into the case a responsible "next friend," who would have been liable for costs, or obtained a dismissal of the action without further trouble or expense. It only remains now to inquire whether by reason of the defendant in error having arrived at his majority, before the termination of the action, a judgment against him for costs would have been proper.

From analogy to the cases of the ratification of the voidable acts of infants after becoming of full age, we think it clear that if, after reaching his majority, he had either assented to judgment on the verdict, or taken a single step in the further prosecution of the action, all the privileges of infancy would thereby have been fully waived, and he would have been bound by the action of the court. But the record shows that, at the very first opportunity after he reached the age of twenty-one years, he disclaimed all benefit from what had been done in the case, and in the most unequivocal manner denied the jurisdiction of the court to proceed further. Our opinion is that a judgment against the defendant in error, under these circumstances, would be equally as erroneous as if it had rendered while he was yet an infant.

Judgment affirmed.